

1                   IN THE DISTRICT COURT OF OKLAHOMA COUNTY

2                                 STATE OF OKLAHOMA

3     STATE OF OKLAHOMA,             )  
4                   Plaintiff,         )  
5     vs                                 ) CM-2016-XXXX  
6     F.N.,                             )  
7                   Defendant.         )

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9                                 \* \* \* \* \*

10                                TRANSCRIPT OF CROSS EXAMINATION

11                                OF TYLER CLANAHAN

12                                HAD ON THE XX DAYS OF XXXX, 2018

13                                BEFORE THE HONORABLE APRIL COLLINS

14                                \* \* \* \* \*

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17     APPEARANCES:

18         For the Plaintiff:

19                 ROB McCLATCHIE and KATE BRANDAN, Assistant  
20     District Attorneys, 320 Robert S. Kerr, Oklahoma City,  
21     Oklahoma 73102

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22         For the Defendant:

23                 JOHN HUNSUCKER and ANGELA SONAGGERA, 600 West  
24     Sheridan Avenue, Oklahoma City, Oklahoma 73102

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25     Reported by: Kim Lewin, CSR

DISTRICT COURT OF OKLAHOMA COUNTY - OFFICIAL TRANSCRIPT

1 XXXXXTH, 2018:

2 TYLER CLANAHAN,

3 Called as a witness, after having been previously sworn,  
4 testified as follows:

5 CROSS-EXAMINATION

6 BY MR. HUNSUCKER:

7 Q Mr. Clanahan, you currently are no longer in law  
8 enforcement?

9 A. That's correct.

10 Q. And are you currently CLEET certified?

11 A. No.

12 Q. And what is CLEET?

13 A. Council of Law Enforcement Education and Training.

14 Q. And as you told the State, as part of that training,  
15 in February 2013, you took field sobriety training?

16 A. I'm sorry, I didn't quite catch that.

17 Q. As part of your training in 2013 in February, you  
18 took field sobriety training, correct?

19 A. I don't believe it was February, but yes, I've taken  
20 training.

21 Q. If your CLEET records say February, you have no  
22 reason to --

23 A. No reason.

24 Q. And that training, you talked about it being the  
25 national guidelines. When we say national guidelines, we

1 mean NHTSA, don't we? National Traffic Highway Safety  
2 Administration?

3 A. That would be correct.

4 Q. Used a manual like this?

5 A. Whatever CLEET provided, I imagine so.

6 Q. Okay.

7 MR. HUNSUCKER: May I approach?

8 THE COURT: Yes.

9 Q. (By MR. HUNSUCKER) Can you identify that manual,  
10 please?

11 A. DWI detection and standard field sobriety testing,  
12 February 2006 edition.

13 Q. Is that by NHTSA?

14 A. As stated on the front.

15 Q. Okay. So this is the field sobriety training that  
16 you were speaking of, correct?

17 A. Yes, sir.

18 Q. Okay. And that training tells you exactly how you  
19 should do this, correct?

20 A. That's correct.

21 Q. And they tell you if you deviate from a standardized  
22 method you compromise the validity of the test, is that  
23 true?

24 A. That is correct.

25 Q. So it's standardized meaning the same every time?

- 1 A. Standardized and systematic, yes, sir.
- 2 Q. If you deviate, it's compromised?
- 3 A That's correct.
- 4 Q. So if it's compromised, it's possible the results
- 5 then are compromised?
- 6 A. That's correct.
- 7 Q. Further, that training is also how to testify in
- 8 court, true?
- 9 A. I think it has a little bit in there, yes, sir.
- 10 Q. It's a 40 hour training session, correct?
- 11 A. I don't remember the exact numbers, but CLEET would
- 12 have the records. If that's what's on there, then I
- 13 imagine so.
- 14 Q. CLEET says 32.5, so. And that was -- that included
- 15 legal background on field sobriety testing, correct?
- 16 A. Yes.
- 17 Q. How to prepare notes?
- 18 A. That's correct.
- 19 Q How to testify in court. So it wasn't all how to do
- 20 three tests, it was more to it?
- 21 A. Pretty comprehensive, yes, sir.
- 22 Q. All in 32 hours?
- 23 A. Whatever the standard was, yes, sir.
- 24 Q. Now part of that training was on how to take proper
- 25 notes and report writing, correct?

- 1 A. That's correct.
- 2 Q. You were taught to put all of the relevant  
3 information in your report?
- 4 A. That's correct.
- 5 Q. And that the report should be descriptive?
- 6 A. That's correct.
- 7 Q. So would you say -- what does descriptive mean to  
8 you?
- 9 A. What's descriptive? Whenever it comes to note  
10 taking, writing down all the pertinent information you  
11 can recall and preferably writing it down sooner rather  
12 than later while it's still clear in your memory.
- 13 Q. So red four-door sedan on a gravel county road, is  
14 better than red car on road?
- 15 A. Preferably, yes.
- 16 Q. That's descriptive. You're taught to write down all  
17 information relevant to proving the arrestee guilty?
- 18 A. All the pertinent information we can think of.
- 19 Q. Well, anything that would be relevant, would you  
20 agree?
- 21 A. Well, I think relevancy depends on the point of  
22 view, but yes.
- 23 Q. And it would include any relevant information you  
24 used in making your probable cause determination?
- 25 A. That's correct.

- 1 Q. And we'll jump back. You used -- you talked earlier  
2 about a portable handheld device that wasn't approved but  
3 you used that in making your probable cause decision,  
4 didn't you?
- 5 A. For the arrest, I did not.
- 6 Q. You did not.
- 7 A. No, sir.
- 8 Q. You did it before arrest, correct?
- 9 A. Technically, yes.
- 10 Q. And so you did not use that in making your decision  
11 to arrest?
- 12 A. I did not.
- 13 Q. Then why did you do it?
- 14 A. It's common practice for me.
- 15 Q. But it's not -- for you, it wasn't a state-issued  
16 device?
- 17 A. Technically it was a device issued as a result of my  
18 DRE training. I don't know if that constitutes a state  
19 issue, but.
- 20 Q. Issued by whom?
- 21 A. The DRE course that I went through.
- 22 Q. You weren't given one in your field sobriety  
23 training?
- 24 A. For CLEET, that is correct.
- 25 Q. And you did not do a drug recognition evaluation

- 1     here, correct?
- 2     A.    I did not.
- 3     Q.    That has nothing to do with this arrest, correct?
- 4     You didn't suspect any drugs in this case?
- 5     A.    I did not.
- 6     Q.    You'd agree that it's important for your report to
- 7     be complete?
- 8     A.    Of course.
- 9     Q.    The Court -- well, the District Attorney's office
- 10    would review it at some point?
- 11    A.    Yes, sir.
- 12    Q.    You want to use the report to be able to accurately
- 13    recall events?
- 14    A.    Of course.
- 15    Q.    Be able to explain to this jury what happened that
- 16    night?
- 17    A.    Yes, sir.
- 18    Q.    Be able to answer questions about what happened to
- 19    the DA and to me?
- 20    A.    Of course.
- 21    Q.    And you were taught the report should be accurate?
- 22    A.    Yes, sir.
- 23    Q.    Concise?
- 24    A.    Yes, sir.
- 25    Q.    Complete?

- 1 A. Of course.
- 2 Q. Before you turned that report in, did you review it?
- 3 A. I did.
- 4 Q. Does the supervisor review it?
- 5 A. They do.
- 6 Q. Do you have an opportunity to make changes?
- 7 A. I do.
- 8 Q. Do you have an opportunity to file an amended
- 9 report?
- 10 A. Of course.
- 11 Q. And do you have an opportunity to file a
- 12 supplemental report?
- 13 A. I do.
- 14 Q. Did you review your report with the district
- 15 attorney before today?
- 16 A. I did.
- 17 Q. Did you review your report last week?
- 18 A. Yes.
- 19 Q. Did you review it today?
- 20 A. Yes.
- 21 Q. Is your report in this case truthful?
- 22 A. Yes.
- 23 Q. Is it accurate?
- 24 A. Yes.
- 25 Q. Is it complete?



- 1 A. To the best of my knowledge, yes.
- 2 Q. Anything you'd like to add to it or change while  
3 we're sitting here?
- 4 A. No, sir.
- 5 Q. Okay. You encountered Mr. F.N. at approximately  
6 westbound on Reno and Meridian?
- 7 A. That's correct.
- 8 Q. So were you west or east of -- let me back up. You  
9 were actually on Reno?
- 10 A. Whenever I first encountered him?
- 11 Q. Yes.
- 12 A. I don't recall if I was specifically on Reno or  
13 Meridian. I wrote down what area I was in.  
14 Unfortunately with it being almost two years ago, I can't  
15 recall back other than what was in my report.
- 16 Q. So, when did you first encounter Mr. F.N.?
- 17 A. Whenever he got out of the car at MacArthur.
- 18 Q. When did you first encounter Mr. F.N.'s vehicle?
- 19 A. In the vicinity of Meridian and Reno.
- 20 Q. Was he in front of you at that point, or did you  
21 have to look across to see him?
- 22 A. Whenever I first laid eyes on the vehicle, I don't  
23 recall.
- 24 Q. So you don't know if you had to U-turn to catch up,  
25 or whether you were already behind him?

- 1 A. Unfortunately I can't remember that far back.
- 2 Q. But you remember that he weaved before the camera  
3 came on?
- 4 A I remember there was weaving as I was following him.
- 5 Q. And you only remember that because it's written in  
6 your report?
- 7 A. Well, whenever you have the opportunity to read a  
8 report, just like taking a note in a personal journal, it  
9 helps to jog memory. Same thing with video. I do my  
10 best to try to describe them as I personally remember  
11 them as you're talking to me.
- 12 Q. Do you have your report with you?
- 13 A. I do.
- 14 Q. Your testimony is that you saw him weaving. Will  
15 you -- just refresh your memory on your report and does  
16 that say in your report anywhere that you saw him  
17 weaving?
- 18 A. "Traveling west on Reno, swerving left to right  
19 within the lane." Technically the verbiage "weaving"  
20 does not appear to be in here, sir.
- 21 Q. In your field sobriety training?
- 22 A. Yes, sir.
- 23 Q. In field sobriety training -- I'm sorry, we'll come  
24 back to that.
- 25 Again, several clubs in this area?

- 1 A. Yes, sir.
- 2 Q. 1:15 on a Saturday?
- 3 A. Yes, sir.
- 4 Q. Why were you in this area?
- 5 A. There's a high concentration of people that drive  
6 under the influence near that area.
- 7 Q. So you have a prenotion then that someone may be  
8 under the influence of alcohol if they are in that area  
9 at 1:15 on Saturday morning?
- 10 A. Previous notion that somebody?
- 11 Q. You make that assumption?
- 12 A. I would make the assumption that there is a higher  
13 statistical probability of somebody being under the  
14 influence of the area that is saturated with people that  
15 drink.
- 16 Q. And there's hotels in that area?
- 17 A. Yes, sir.
- 18 Q. Restaurants in that area?
- 19 A. Of course there are.
- 20 Q. Would you agree that not everybody who goes to a bar  
21 is drinking?
- 22 A. Mostly definitely, sir.
- 23 Q. Reno is a four-lane divided road through there?
- 24 A. Two one and two the other, yes, sir.
- 25 Q. Two lanes going one direction, divided, big canal,

- 1 two lanes the other direction?
- 2 A. Yes.
- 3 Q. So it's designed for a high flow of traffic through
- 4 that area?
- 5 A. Yes, sir.
- 6 Q. It's a heavily traveled thoroughfare?
- 7 A. Yes, sir.
- 8 Q. And so it would be reasonable that people would be
- 9 driving through there that didn't even go to any of the
- 10 clubs in that area?
- 11 A. Of course, sir.
- 12 Q. Were you looking for DUIs?
- 13 A. Yes, sir.
- 14 Q. Do you get overtime pay for drivers license hearings
- 15 during the day?
- 16 A. Do I get overtime pay for drivers license hearings?
- 17 Q. Yes. You work night shift, correct?
- 18 A. I do.
- 19 Q. And if they contest the license, you have to go to
- 20 driver's license hearing in the afternoon, correct?
- 21 A. Unfortunately.
- 22 Q. Do you get overtime pay for that?
- 23 A. Whether it be comp time, overtime depends on what's
- 24 going on at the time, but yeah, there's that possibility,
- 25 yes, sir.

- 1 Q. So you do derive a benefit by going to a hearing  
2 outside of your regular shift?
- 3 A. Derive a benefit --
- 4 Q. Yes.
- 5 A. To going to a hearing outside my shift?
- 6 Q. Yes, a comp time or overtime pay, whatever?
- 7 A. Based on your direction of questioning, I imagine  
8 so; the benefits for personal, I'm not entirely sure. I  
9 mean, I worked a night shift, 6 p.m. to 6 a.m. so I  
10 always kind of felt it was a bit more of a pain in the  
11 tukus to have to get up in the middle of what you would  
12 otherwise be sleeping to come to a drivers license  
13 hearing. But I understand now what you're asking, yes.
- 14 Q. So let's go back to the basic question; you do get  
15 comp time for it?
- 16 A. Yes, sir.
- 17 Q. Now, you pull him over for going into the outside  
18 turn lane when he made his turn, correct?
- 19 A. Yes.
- 20 Q. Have you pulled over other people for that?
- 21 A. Yes, sir.
- 22 Q. Was every single one of them under the influence of  
23 alcohol?
- 24 A. No, sir.
- 25 Q. So that alone is not necessarily an indication that

1 he's under the influence of alcohol?

2 A. It can be an indication, but there's no guaranty, of  
3 course.

4 Q. Now, let's go back to the NTSHA training. In your  
5 training guidelines, is swerving and weaving the same  
6 clue, or are they separate clues?

7 A. I think that there's that opportunity for a  
8 breakdown to define those as two separate things. But  
9 according to the training, I can't recall.

10 Q Do you recall being taught that there is 36  
11 different visual cue descriptions?

12 A. I don't remember the exact number, no, sir.

13 Q. Would looking at the manual refresh your memory?

14 A. Well, looking at the manual would allow me to spit  
15 out whatever I read, so, yeah.

16 MR. HUNSUCKER: May I approach?

17 Q (BY MR. HUNSUCKER) What is the very first visual cue  
18 listed?

19 A. First clue listed, weaving.

20 Q. Can you tell me what the description of weaving is,  
21 please.

22 A. Weaving, "Weaving occurs when a vehicle  
23 alternatively moves towards one side of the roadway and  
24 then the other, creating a zigzag course. The pattern of  
25 a lateral movement is relatively regular as one steering

1 correction is closely followed by the other."

2 Q. Can you tell me the description listed in D?

3 A. D would be listed as swerving. Would you like me to

4 read the description?

5 Q. I would.

6 A. "A swerve is an abrupt turn away from a generally

7 straight course. Swerving might occur directly after a

8 period of drifting when the driver discovers the approach

9 of traffic in an oncoming lane, or discovers that the

10 vehicle is going off the road. Swerving might also occur

11 as an abrupt turn is executed to return the vehicle to

12 the traffic lane. In the illustration below a swerve is

13 executed to return to a lane after a period of drifting

14 towards opposing traffic."

15 Q. So, I don't -- in your report you put swerving.

16 You've testified here weaving. Two different things.

17 Which is it? Was HE weaving or was he swerving?

18 A. Well, I labeled it as weaving. That's what I would

19 say I saw.

20 Q. Now, you label it in your report, though, as

21 swerving though, didn't you?

22 A. To me --

23 Q. You need to refresh your memory?

24 A. -- to me, sir, the swerving and weaving is a

25 proximity of the same word. Now, I can read a definition

1 here, but if I tell somebody, hey, they are swerving back  
2 and forth and to say weaving, which applies, back and  
3 forth, to me it constitutes as approximately the same  
4 thing.

5 Q You were trained on how to administer and arrest  
6 people, correct?

7 A. Yes, sir.

8 Q. This is the training?

9 A. Yes, sir.

10 Q. That's the definitions they gave you?

11 A. This is the definitions, yes, sir.

12 Q. And so, you're saying that you're not using those  
13 definitions?

14 A. I'm saying that I'm using the definition applicable  
15 to what I saw.

16 Q. So you're not -- so then the stop wasn't based on  
17 your training in that manual?

18 A. Define the question again, I'm sorry.

19 Q. So the stop was not based on the training you  
20 evidence in that manual?

21 A. No, sir. The stop was based on failure to maintain  
22 his lane.

23 Q. Back up. Not the stop. When you come to this Court  
24 and you say he's weaving or swerving, it's the same  
25 thing. That's not the terms you were taught according to



- 1     those definitions to use when describing a person's  
2     driving pattern that may be a sign of intoxication?
- 3     A.    I would agree that it does not apply to these  
4     definitions to state swerving or weaving.
- 5     Q.    As part of your training you were taught to be able  
6     to go to court and describe things, correct?
- 7     A.    Yes, sir.
- 8     Q.    And they gave you terms to use to describe it?
- 9     A.    Yes, sir.
- 10    Q.    You have not used those terms, have you, in the way  
11    they trained you to use them?
- 12    A.    I did use those terms.
- 13    Q.    So in your training they gave a whole list of  
14    possible clues that someone could be under the influence  
15    of alcohol by their driving pattern, correct?
- 16    A.    Correct.
- 17    Q.    So other than when -- and we're going to take out  
18    weaving and swerving out of here. Was he straddling the  
19    lane?
- 20    A.    No, sir.
- 21    Q.    Was he drifting?
- 22    A.    Yes, sir.
- 23    Q.    Oh, so now we've got -- I'm sorry. Is that in your  
24    report anywhere?
- 25    A.    No, sir.

1 Q. So we're adding drifting today?

2 A. It's a descriptor that applies to similar driving  
3 patterns. That's the beauty of the English language.  
4 There's a lot of words that describe similar things.

5 Q. I'm interested in the words you were trained on  
6 though. So are you saying the training you received and  
7 the definitions of those words, that he was drifting  
8 also?

9 A. I'm saying that whatever you're speaking to me now,  
10 and whenever we spoke on Friday, whatever I'm using the  
11 verbal descriptor, meaning me talking right now, whenever  
12 I say the word "weaving" doesn't necessarily negate  
13 what's in my report whenever I describe it as swerving.

14 Q. You were taught to put everything relevant to the  
15 stop into your report, correct?

16 A. Yes, sir.

17 Q. Drifting is not in your report anywhere, is it?

18 A. No, sir.

19 Q. The drifting, was it one time, was it several times,  
20 was it over the course of a mile?

21 A. It's not in my report. It's over two years ago and  
22 I can't recall, so.

23 Q. But you recall today that he was drifting?

24 A. Well, I recall based on my report and the video.

25 Q. Okay. So you're saying that the drifting is on the

1 video?

2 A. I'm saying that I recall based on my report and the  
3 video.

4 Q. So you're saying -- I want to break that down.  
5 Drifting is not listed in your report, is it?

6 A. No, sir.

7 Q. Are you saying there's drifting that you can see on  
8 that video?

9 A. I don't know.

10 Q. Well, you just testified that based on that video  
11 you remember drifting now?

12 A. I just said based on my report and that video, as in  
13 one, the other, or both.

14 Q. Which one was it in this case?

15 A. Which one?

16 Q. Yeah, you said it was one, the other, or both. So  
17 I'm asking you, was it the video, or was it the report,  
18 or was it both that jogged your memory that he was  
19 drifting?

20 A. Well, all that appears to be going on right now is a  
21 word game of tomato, tomato.

22 MR. HUNSUCKER: Judge --

23 THE WITNESS: I don't know how to answer, I'm  
24 sorry, sir.

25 THE COURT: Let's approach.

- 1           (Discussion had at the bench and not transcribed.)
- 2   Q.   (BY MR. HUNSUCKER) Let's continue on that 36 visual
- 3   clues. Did he almost strike an object or a vehicle?
- 4   A.   Not that I saw.
- 5   Q.   Well, if you had seen it, you would have written it
- 6   down?
- 7   A.   Probably, yes.
- 8   Q.   You're trained to write down everything relevant,
- 9   correct?
- 10  A.   Yes, sir.
- 11  Q.   Any difficulty stopping?
- 12  A.   Did the defendant have any difficulty stopping?
- 13  No.
- 14  Q.   Didn't stop too far or too short or too jerky?
- 15  A.   No.
- 16  Q.   Did he accelerate rapidly?
- 17  A.   No, sir.
- 18  Q.   Did he decelerate rapidly?
- 19  A.   No, sir.
- 20  Q.   Did he have varying speed?
- 21  A.   No, sir.
- 22  Q.   Did he have any slow speed?
- 23  A.   No, sir.
- 24  Q.   Was he driving in the opposing lane?
- 25  A.   No, sir.

- 1 Q. Was he was driving the wrong way on a one way  
2 street?
- 3 A. No, sir.
- 4 Q. Did he have a slow response to a traffic signal?
- 5 A. No, sir.
- 6 Q. Did he fail to respond to your signal?
- 7 A. No, sir.
- 8 Q. Did he stop in the lane for no apparent reason?
- 9 A. No, sir.
- 10 Q. Was he driving without headlights?
- 11 A. No, sir.
- 12 Q. Did he fail to signal?
- 13 A. No, sir.
- 14 Q. Did he signal inconsistent with his action?
- 15 A. No, sir.
- 16 Q. Was he following too closely?
- 17 A. No, sir.
- 18 Q. Was there an improper lane change?
- 19 A. There is an improper turn. I don't know if that  
20 classifies as lane change to turn --
- 21 Q. That's listed separately and we've already talked  
22 about that, so improper lane change?
- 23 A. No, sir.
- 24 Q. Unsafe lane change?
- 25 A. Again, with the turn versus lane change.

- 1 Q. Wide radius turn is listed as a separate one of its  
2 own?
- 3 A. Thank you, sir.
- 4 Q. So illegal turn, which is not a wide turn?
- 5 A. Which is not a wide turn?
- 6 Q. Right. This a clue, one clue for driving with a  
7 wide -- turning with a wide radius, and that's what  
8 you're saying he did, correct? That's what you pulled  
9 him over for.
- 10 A. That's correct.
- 11 Q. This is a different clue, illegal turn?
- 12 A. That's --
- 13 Q. Did he make an illegal U-turn, did he --
- 14 A. Thank you for the clarification. No, he didn't make  
15 any kind of an illegal U-turn.
- 16 Q. Was he driving somewhere other than the proper  
17 roadway he should be driving on?
- 18 A. No, sir.
- 19 Q. Did he stop inappropriately to your -- in response  
20 to your lights?
- 21 A. No, sir.
- 22 Q. Inappropriate unusual behaviors like throwing stuff  
23 out of the windows or anything?
- 24 A. No, sir.
- 25 Q. Was he tightly gripping the steering wheel?

- 1 A. Couldn't see.
- 2 Q. Was he slouching in the seat?
- 3 A. Couldn't see.
- 4 Q. Was he gesturing erratically or obscenely?
- 5 A. Couldn't see.
- 6 Q. Was his head protruding from the vehicle?
- 7 A. No, sir.
- 8 Q. A lot of things that you're trained to look for that
- 9 you didn't see, correct?
- 10 A. That's correct.
- 11 Q. When Mr. F.N. stopped his vehicle, he put it in
- 12 park?
- 13 A. Yes, sir.
- 14 Q. The vehicle didn't roll or anything?
- 15 A. No, sir.
- 16 Q. That would be an indication possibly of someone
- 17 under the influence, wouldn't it?
- 18 A. It would be another indication.
- 19 Q. Doesn't block any traffic?
- 20 A. No, sir.
- 21 Q. Doesn't hit any curbs?
- 22 A. No, sir.
- 23 Q. When you go to the vehicle, was Mr. F.N.
- 24 cooperative?
- 25 A. Absolutely.

- 1 Q. Provided you his driver's license?
- 2 A. Yes, sir.
- 3 Q. Did he fumble with the license?
- 4 A. I didn't see him fumble with any license, no, sir.
- 5 Q. And that's something you're trained to look for,
- 6 right?
- 7 A. It would be another clue, yes.
- 8 Q. If he had dropped his license, you would have noted
- 9 that?
- 10 A. Possibly, yeah.
- 11 Q. If he handed you a credit card instead of his
- 12 license, you would have noted that?
- 13 A. It definitely would have been another clue, yes,
- 14 sir.
- 15 Q. Right. That's one of the first things you're
- 16 supposed to look for is when you ask for a license if
- 17 they can't do it correctly, correct?
- 18 A. I don't know about one of the first things, but
- 19 definitely up among the list of things that are recurring
- 20 events.
- 21 Q. So he had no issue with his manual dexterity when he
- 22 handed you the license?
- 23 A. No, sir.
- 24 Q. And he answered the questions?
- 25 A. Yes, sir.



- 1 Q. You said his speech was slurred?
- 2 A. Yes, sir.
- 3 Q. Today you said slightly slurred?
- 4 A. I did say that today.
- 5 Q. Yes.
- 6 A. Yes.
- 7 Q. Do you recall testifying on Friday?
- 8 A. Yes.
- 9 Q. Do you recall me asking you on Friday if you recall
- 10 the extremity of the amount of the slur? I asked you if
- 11 Mr. F.N. had slurred speech, can you explain if it's
- 12 slightly slurred, moderately slurred, extremely slurred,
- 13 your answer was, "I don't recall the extremity of the
- 14 slur. It's something that I personally note and I write
- 15 it down"?
- 16 A. That's correct.
- 17 Q. So just as recent as Friday you couldn't tell me
- 18 then whether it was slightly, moderate or heavy?
- 19 A. That's correct.
- 20 Q. But today you can tell me it's slight?
- 21 A. I had the opportunity to review video which
- 22 additionally helped jog my memory, yes, sir.
- 23 Q. So are you saying that the slightly slurred speech
- 24 is on the video?
- 25 A. I imagine so.

- 1 Q. Which part, do you recall?
- 2 A. I don't recall.
- 3 Q. Was it -- was the slurred speech constant through
- 4 the entire stop?
- 5 A. I don't recall. I don't think so.
- 6 Q. So was it just during the initial contact, was it
- 7 during the testing, was it during the arrest, at which
- 8 point was it slurred?
- 9 A. At some point in time during the contact.
- 10 Q. You just testified that you watched the video and
- 11 that's what jogged your memory that it was slightly
- 12 slurred, but you didn't remember which part it was
- 13 slightly slurred?
- 14 A. Right.
- 15 Q. And you're trained -- part of your training was to
- 16 be able to take notes to be able to present to the jury
- 17 what actually happened, correct?
- 18 A. That is correct.
- 19 Q. Did you ask Mr. F.N. if he any speech
- 20 impediments?
- 21 A. I did not.
- 22 Q. Dentures?
- 23 A. Did not.
- 24 Q. So you asked him if he was drinking, correct?
- 25 A. I did.

- 1 Q. Did you ask the timeframe?
- 2 A. I did not.
- 3 Q. Did you ask when the last drink was?
- 4 A. I don't think so, no, sir.
- 5 Q. Did you ask when he started?
- 6 A. No, sir.
- 7 Q. Did you ask the size of the drink?
- 8 A. No, sir.
- 9 Q. Did you ask him the alcohol percentage of the drink?
- 10 A. No, sir.
- 11 Q. Did you ask him when he ate last?
- 12 A. No, sir.
- 13 Q. Wouldn't these be relevant questions if you're
- 14 trying to determine if someone's under the influence of
- 15 alcohol?
- 16 A. No, sir.
- 17 Q. Why would they not be relevant?
- 18 A. It could be a helpful indicator, but as far as
- 19 relevancy to figure out whether or not somebody's under
- 20 the influence of alcohol, time or food consumption
- 21 doesn't necessarily play a relevance. I'm sure for the
- 22 most part, all of us have at one time another experienced
- 23 or had the experience of a friend who could have drank
- 24 12, 15 hours ago and go to sleep and then wake up still
- 25 driving under the influence. And others who could drink

- 1 within an hour and be under the influence as well.
- 2 Q. Okay. So if it's not relevant, or it's just helpful
- 3 so you didn't need to know it, then why did you ask him
- 4 if he had alcohol?
- 5 A. To reconfirm what I was smelling.
- 6 Q. So it's not important to know how much or size or
- 7 alcohol percentage, but it's important enough to ask him
- 8 how many he had. We just don't want to know the time
- 9 frame?
- 10 A. It's another one of those indicators, yes, sir.
- 11 Q. Wouldn't it be an indicator if he had the four beers
- 12 over six hours versus four beers over one hour?
- 13 A. That could play a part, yes, sir, on the level of
- 14 intoxication, yes, sir.
- 15 Q. And that would be something that would be helpful if
- 16 you were trying to explain to the jury today, wouldn't
- 17 it?
- 18 A. It could be helpful, yes, sir.
- 19 Q. But you didn't do that, did you?
- 20 A. No, sir.
- 21 Q. But you're trained to do that, correct?
- 22 A. I'm not trained to ask every single one of those
- 23 questions at every single stop.
- 24 Q. You're trained to collect evidence and to prove your
- 25 case to a jury, correct?

- 1 A. That is correct.
- 2 Q. Descriptive terms?
- 3 A. As descriptive as can be, yes, sir.
- 4 Q. If you had asked these questions, would you have
- 5 written it in the report, his answers?
- 6 A. Maybe, maybe not.
- 7 Q. If the answer was possibly an answer that would help
- 8 convict him, would you write that down?
- 9 A. It would be relevant to the arrest, so probably.
- 10 Q. If there was an answer that wouldn't help convict
- 11 him, would you write that down?
- 12 A. Depends on the circumstances, but be less inclined
- 13 to go out of my way to write it down, or try to remember
- 14 it, for that matter.
- 15 Q. I'm curious, because you asked him, after how many
- 16 drinks, you ask him over what time frame, but you didn't
- 17 write it down. So I'm just curious, do you remember the
- 18 answer?
- 19 A. Four to five beers.
- 20 Q. And then you asked either -- you asked -- I think
- 21 you asked, when was the last one?
- 22 A. Again, I don't recall.
- 23 Q. So that could have been an answer that really wasn't
- 24 in your favor then?
- 25 A. The relevance of when the last time and whether

1     somebody's under the influence of alcohol is null and  
2     void.

3     Q.    So if I had my last beer 12 hours ago, versus 20  
4     minutes ago, that's not relevant?

5     A.    Well, sir, there's nothing wrong with drinking and  
6     driving. There's something wrong with driving under the  
7     influence. You can have one beer, possibly, and be  
8     perfectly safe to drive. There's nothing illegal about  
9     that. The question is whether or not somebody is under  
10    the influence and impaired. And that's the determination  
11    I'm trying to make in the middle of that stop.

12    Q.    Okay. And trying to make that decision, would it be  
13    helpful to know how much and when the last one was?

14    A.    I imagine that there's a possibility of it being  
15    helpful, yes, sir.

16    Q.    And just to be clear, you did not write in your  
17    report what his answer was to that question of when the  
18    last one was?

19    A.    I don't believe I did.

20    Q.    Well, your report's in front of you.

21    A.    Would you like me to read my report?

22    Q.    Yeah. Instead of guessing, I would like a real  
23    answer?

24    A.    Okay. On 7/30/16 --

25    Q.    No, I don't want you to read your report. I want

1     you to use your report to refresh your memory.

2     A.   I'm sorry, sir. Just one moment, please.

3           I apologize. Just a moment.

4           I believe the answer to your question is no, sir.

5     Q.   Do you write your reports right after you do the

6     stop?

7     A.   I try to make sure and complete my reports within a

8     few hours.

9     Q.   Do you write each report fresh or do you use a form?

10    A.   Both.

11    Q.   Do you cut and paste from other reports into this

12    report?

13    A.   There are some parts that can be cut and pasted,

14    yes, sir.

15    Q.   Okay. Now, you indicate in your report that there

16    was an odor of an alcoholic beverage, correct?

17    A.   Yes, sir.

18    Q.   Was it a slight odor, a moderate odor, or strong

19    odor?

20    A.   I don't recall.

21    Q.   That would be a descriptive term wouldn't it,

22    strong, moderate?

23    A.   The argument could also be made that writing down

24    that I smelled the odor was a descriptor in and of

25    itself. But yes, there are varying levels of

1 description.

2 Q. You would agree it would be more helpful if we  
3 actually knew whether it was slight, moderate or heavy,  
4 wouldn't you?

5 A. I don't think it pertains to the relevance of  
6 whether or not somebody is driving under the influence.  
7 Again, proximity of time. Somebody could drink one beer  
8 10 minutes ago and have a strong odor of alcohol, it  
9 doesn't mean that they are under the influence. You  
10 could have somebody that maybe both drinks and took  
11 pills, or just pills by themselves, it doesn't change the  
12 fact that even though there's less of an odor, they may  
13 be more impaired.

14 Q. So we can agree based on what you just said that the  
15 odor of alcoholic beverage by itself does tell you if  
16 you're under the influence or not?

17 A. That's correct. I'm sorry, I didn't understand.

18 Q. No, no. That was the question.

19 Okay. From that odor, you can't tell how many he's  
20 had?

21 A. No, sir.

22 Q. You can't tell when the last one was?

23 A. No, sir.

24 Q. You can't tell when they started?

25 A. No, sir.



- 1 Q. You can't tell what they were drinking?
- 2 A. Other than it had alcohol in it no, sir.
- 3 Q. You can't tell if it's 3.2 beer or 8 percent beer?
- 4 A. That's correct.
- 5 Q. You said that he had bloodshot eyes?
- 6 A. Bloodshot and watery eyes.
- 7 Q. What time was it?
- 8 A. Relative to a little after 1 in the morning.
- 9 Q Did you ask him how long he had been awake?
- 10 A. I did not.
- 11 Q. Ask him if he had conjunctivitis in his eyes?
- 12 A. I didn't ask that specific question. I asked if
- 13 there were any medical issues I suppose that may apply to
- 14 that question.
- 15 Q. Did you ask them if he had been swimming that day?
- 16 A. No, sir.
- 17 Q. Ask him if he was suffering from any hayfever or
- 18 anything?
- 19 A. No, sir.
- 20 Q. You would agree that people can have bloodshot eyes
- 21 and not have any alcohol in their system whatsoever?
- 22 A. Absolutely.
- 23 Q. And the same with watery eyes. My eyes always
- 24 water.
- 25 A. Absolutely.

- 1 Q You made the decision to do the field sobriety test  
2 before you ever got him out of the jeep, correct?
- 3 A. Before I got him out of the Jeep I had made the  
4 decision to have him conduct a sobriety test, yes, sir.
- 5 Q. And he didn't have a choice then, did he?
- 6 A. I suppose there's always a choice, but I didn't give  
7 him an option.
- 8 Q. And he does have an option, though, doesn't he?
- 9 A. He can refuse, I suppose, but I didn't ask it in the  
10 form of a question. I said step out.
- 11 Q. Right. You told him, we're going to do tests?
- 12 A. Correct.
- 13 Q. You never told him it was a voluntary test?
- 14 A. Correct.
- 15 Q. Never told him, you don't have to do these?
- 16 A. Correct.
- 17 Q. Mr. F.N. was in a Jeep Wrangler?
- 18 A. Yes, sir.
- 19 Q. Have you ever driven a Jeep Wrangler?
- 20 A. I have.
- 21 Q. So you're aware that to step out of a Jeep, the door  
22 sill is actually kind of high?
- 23 A. Yes, sir.
- 24 Q. It's not smooth like a regular car to get out?
- 25 A. A little bit higher than the average bear, yes, sir.

- 1 Q. Did Dr. Mr. F.N. have any difficulty opening the  
2 door?
- 3 A. I didn't see any difficulty.
- 4 Q. If he had, you would have noted that because that  
5 would be a possible --
- 6 A. It would have been a possible indication.
- 7 Q. And did he have any difficulty stepping up over the  
8 door sill and getting out of the Jeep?
- 9 A. Not that I recall.
- 10 Q Well, you would have noted it if so, correct?
- 11 A. There's a possibility, yes, sir.
- 12 Q. Because that would be an indication he would be  
13 under the influence of alcohol?
- 14 A. Correct.
- 15 Q. And that's not in your report, is it?
- 16 A. It is not.
- 17 Q. So can we assume then there was none?
- 18 A. We can assume that there's a strong possibility that  
19 there's none, but I don't recall. I'm just trying to  
20 give you most the honest answer I can.
- 21 Q. Well, you're qualifying. So I just want to be  
22 clear, it's not written in your report, correct?
- 23 A. If it's not written in my report and I can't recall,  
24 then for all intents and purposes, didn't happen.
- 25 Q. He was wearing flip-flops?

- 1 A. He was.
- 2 Q. Did he have any difficulty walking to your car?
- 3 A. I didn't note any, no, sir.
- 4 Q. Had you seen any, you would have noted it?
- 5 A. If somebody was falling down, yeah.
- 6 Q. Even stumbling or --
- 7 A. Correct.
- 8 Q. You know, is an indicia of intoxication, correct?
- 9 A. Yes, sir.
- 10 Q. Now, you watched the video. When he's walking  
11 towards car, he's walking towards your flashing lights,  
12 is that true?
- 13 A. And didn't appear to have any difficulty.
- 14 Q. Which is my question. He had no problem with  
15 flashing lights in his face walking?
- 16 A. Correct.
- 17 Q. Didn't use his Jeep for balance?
- 18 A. Not that I saw, no, sir.
- 19 Q. So during this time frame was there anything, before  
20 we start getting into any field sobriety test, was there  
21 anything during this time about the way he got out of the  
22 vehicle and walked to the car before the test as far as  
23 any physical activity with his body that would lead you  
24 to believe he was under the influence of alcohol?
- 25 A. Other than the smell?

- 1 Q. Yes.
- 2 A. Driving behavior.
- 3 Q. Physical activity?
- 4 A. No, sir.
- 5 Q. Walked fine, talked -- well, he walked fine?
- 6 A. Right.
- 7 Q. Let's talk about the field sobriety test.
- 8 A. Okay, sir.
- 9 Q. Now, these aren't pass or and fail tests, correct?
- 10 A. No, sir.
- 11 Q. They are actually only to be used as a possible
- 12 indicator that someone may be under the influence?
- 13 A. If what you're asking is, if they are 100 percent
- 14 failsafe short of a breath test, to do the standardized
- 15 field sobriety test to determine whether or not someone
- 16 is over the legal limit, the answer is no.
- 17 Q. My question is that it's not a pass/fail?
- 18 A. That's correct.
- 19 Q. It's to be used that clues that you see, the results
- 20 you see are just possible indicators that someone may be
- 21 under the influence of alcohol?
- 22 A. That's true.
- 23 Q. So it's not a pass/fail test, but why did you tell
- 24 him when he was being arrested he was being arrested
- 25 because he failed the field sobriety test?

- 1 A. Common language.
- 2 Q. So you hold a stimulus in front of his face. How
- 3 far do you hold that stimulus out?
- 4 A. 12 to 15 inches.
- 5 Q. Eye level?
- 6 A. Just above eye level.
- 7 Q. How many passes do you make?
- 8 A. Well, two for each eye per portion of the HGN test.
- 9 Q. How many total passes did you make?
- 10 A. If you were excluding watching for equal tracking,
- 11 then -- sorry.
- 12 Q. Let me help you out. It's a standardized test,
- 13 correct?
- 14 A. 12.
- 15 Q. Well, let's walk through it a little more.
- 16 Standardized test, correct?
- 17 A. Yes.
- 18 Q. Two passes to check for equal tracking?
- 19 A. Right.
- 20 Q. Has nothing to do with dilation, you're actually
- 21 just looking for equal tracking in the eyes?
- 22 A. Correct.
- 23 Q. So there's two. Two passes to check for lack of
- 24 smooth pursuit?
- 25 A. That's correct.

- 1 Q. Two passes to check for nastagmus maximum deviation?
- 2 A. That's correct.
- 3 Q. Two passes to check for onset of nastagmus prior to
- 4 45 degrees?
- 5 A. That's correct.
- 6 Q. That's it, right?
- 7 A. Those are the total of the passes.
- 8 Q. So eight passes total?
- 9 A. Sure.
- 10 Q. And that is meant to be given the same every single
- 11 time?
- 12 A. It is.
- 13 Q. Never deviate?
- 14 A. Based on the written description of the scientific
- 15 method of standardized and systematic, you should not
- 16 deviate. However, whenever you're conducting horizontal
- 17 gaze nastagmus, the deviation is in reference to
- 18 conducting that appropriately. Does not exclude,
- 19 however, if you need to double-check an eye because you
- 20 weren't sure if you saw, let's say, for example,
- 21 nastagmus starting at 35 or 40 degree. So if I want to
- 22 see it one more time, I can.
- 23 Q. Are you familiar with the term fatigue nastagmus?
- 24 A. I am.
- 25 Q. And that's where if you do it too many times it will

1 show nastagmus, correct?

2 A There's is a possibility, yes, sir.

3 MS. BRANDON: Objection. May we approach, Your  
4 Honor?

5 (Discussion had at the bench and not transcribed.)

6 Q. (BY MR. HUNSUCKER) Let me pick up with the last  
7 question. I want to make sure we got it in.

8 A. Please.

9 Q. Fatigue nastagmus is -- what is fatigue nastagmus?

10 A. Fatigue nastagmus, based on my recollection is --  
11 constitutes as overact -- overaction or overworked eyes  
12 can induce nastagmus.

13 Q. So --

14 A. And that there's many other things that can as well.

15 Q. Right. So you agree that that's why the  
16 standardized method is so important, and the standardized  
17 passes?

18 A. I would agree.

19 Q. So what are the three clues you're looking for on  
20 the HGN?

21 A. Lack of smooth pursuit. Nastagmus at maximum  
22 deviation. And onset of nastagmus prior to 45 degrees.

23 Q. Okay. On lack of smooth pursue, how long did you  
24 take to move the stimulus out each side?

25 A. Approximately four seconds from end to end. So two



- 1 from center. The standard practice as far as being  
2 taught two seconds to two seconds. I tend to refer to it  
3 as four seconds from far outside to far outside, but yes.
- 4 Q. Two seconds out?
- 5 A. Right.
- 6 Q. And two seconds back?
- 7 A. Two seconds out.
- 8 Q. So two seconds each way. So you'd have, with two  
9 passes, you would have 16 seconds, correct? Two, four,  
10 six, eight, ten, twelve.
- 11 A. Right.
- 12 Q. 16 seconds. So nastagmus maximum deviations, how  
13 long does it take -- are you supposed to take to go out?  
14 Or how long do you take?
- 15 A. Once you get to the far outside?
- 16 Q. Yeah, how long do you take to get to the far  
17 outside?
- 18 A. Standard, the two seconds.
- 19 Q. So that's 16 seconds again.
- 20 Now, when you -- you're looking for nastagmus at  
21 maximum deviation, what -- can you describe the nastagmus  
22 you're looking for? Is it slight, is it moderate, how  
23 would you describe it?
- 24 A. Sustained.
- 25 Q. What does sustained mean?

- 1 A. It means it's consistently happening.
- 2 Q. So do you hold it for a certain time frame?
- 3 A. Four seconds.
- 4 Q. So if you saw that clue, then you'd add another 16
- 5 seconds on top of that where you have to hold it?
- 6 A. Right, if you're holding it for the full four
- 7 seconds, that's correct.
- 8 Q. So it's another 16 seconds. You're saying in this
- 9 case that he had that, correct?
- 10 A. Yes, sir.
- 11 Q. So on the video, we'll be able to see you hold the
- 12 stimulus for four seconds four different times?
- 13 A. Probably not.
- 14 Q. Why not?
- 15 A. Well, whenever you see the nystagmus happening,
- 16 there's no sense in overstressing the eye. And so it may
- 17 end up being three seconds. It may end up being three
- 18 and a half. I'm not sure that it counts by a stopwatch
- 19 to be exact four, is what I'm saying.
- 20 Q. To be a clue it has to be sustained, correct?
- 21 A. That's correct.
- 22 Q. To be sustained it has to be a minimum of four
- 23 seconds, correct?
- 24 A. I believe so. I can't remember. I believe it's
- 25 four seconds, to answer your question.

- 1 Q. And then the onset of nastagmus prior to 45 degrees,  
2 how long are you supposed to take to move the stimulus  
3 out to the edge of the shoulder?
- 4 A. I believe it's four seconds.
- 5 Q. Four seconds. So once again, another 16 seconds?
- 6 A. For both eyes to include those.
- 7 Q. On that clue you're looking for onset of nastagmus  
8 prior to 45 degrees. How do you determine the 45 degree  
9 angle?
- 10 A. It's kind of like a triangle, distance away from the  
11 face, and same relative distance to the right or left  
12 would constitute that 45 degrees.
- 13 Q. You don't hold a triangle piece up there, though, do  
14 you?
- 15 A. That's correct.
- 16 Q. So you're kind of estimating?
- 17 A. That is correct.
- 18 Q. Without getting into what degrees he was, because  
19 that would be improper, the difference between 44 degrees  
20 and 46 degrees would give you a clue or no clue?
- 21 A. That's correct.
- 22 Q. Besides sustained nastagmus, how would you describe  
23 the nastagmus that you saw in this case? Was it a slight  
24 nastagmus, moderate nastagmus, how would you describe it?
- 25 A. I don't really recall, other than the distinction

1 aspect, of course.

2 Q. So you're saying --

3 A. Is that what you're asking distinct and sustained  
4 nastagmus, the verbiage that goes with the training. In  
5 other words, could I see it.

6 Q. When you saw --

7 A. Right.

8 Q. Now on onset 45 degrees, when you see nastagmus of  
9 onset prior to 45 degrees, what do you do?

10 A. Whenever I see the nastagmus prior to 45 degrees,  
11 I'll tend to as soon as I see it come back to it until I  
12 lose the nastagmus, and then go back out just a little  
13 bit until I find where it's sustained, where it's  
14 continuing at. Is that what you're asking?

15 Q. So do you keep it in constant motion, or do you  
16 stop, what do you do there?

17 A. The best way I at least think to describe it is if  
18 my hand is coming out this way, and the eyes start  
19 shaking at this point right here, but I'm trying to  
20 figure out relative to within 45 degrees where that angle  
21 of onset is beginning. But my hand is in a slow steady  
22 motion, as soon as it gets outside of that and I start to  
23 see it, I'm going to come back in to where it stops, and  
24 maybe flow it out just a little bit until I can roughly  
25 find as close as I can to that approximation to the

- 1 degree angle.
- 2 Q. Is that a constant motion or do you ever stop?
- 3 A. I stop.
- 4 Q. Did the manual tell you to -- when you got out to a  
5 certain point to come back and try it a few times?
- 6 A. That's the way I was taught to do it, yes, sir.
- 7 Q. You said you had vertical gaze nastagmus. You're  
8 saying in this case he had vertical gaze nastagmus?
- 9 A. Yes, sir.
- 10 Q. How did you confirm that?
- 11 A. By taking the stimulus above his line of sight and  
12 watching for nastagmus.
- 13 Q. Do you stop and hold it?
- 14 A. I do.
- 15 Q. How long do you hold it for?
- 16 A. I believe the book again would call for four  
17 seconds.
- 18 Q. Did you do that in this case?
- 19 A. I don't believe so, sir.
- 20 Q. So that's really not a clue then, is it?
- 21 A. Even if I had held it for four seconds, vertical  
22 gaze nastagmus doesn't constitute as a clue.
- 23 Q. But when you told this jury that you saw vertical  
24 gaze nastagmus, and that was part of your testing, you  
25 actually didn't do it correctly, did you?

- 1 A. I would say that that's an accurate statement, if it  
2 wasn't held for four seconds, which I don't believe it  
3 was.
- 4 Q. Let's move on to walk and turn, talk about that for  
5 a little bit. The walk and turn test was done on  
6 pavement, is that correct?
- 7 A. I can't recall if it was pavement or asphalt, but  
8 I'm sure I noted it in my report.
- 9 Q. And by pavement I meant asphalt.
- 10 A. Yeah.
- 11 Q. You had Mr. F.N. removed his shoes, correct?
- 12 A. I did have him remove his sandals, yes, sir.
- 13 Q. Flip-flops?
- 14 A. Yes, sir.
- 15 Q. Did you check out the pavement to see if there's any  
16 small pebbles or anything that he would step on that  
17 could hurt his feet?
- 18 A. I visually inspected, yes, sir.
- 19 Q. Did you do it with your flashlight?
- 20 A. No, sir, the lighting was fairly sufficient for  
21 testing.
- 22 Q. Did you walk the line or just kind glanced over it?
- 23 A. We were both kind of standing there relative to the  
24 exact same spot, so, you know, like I said, I visually  
25 inspected to make sure that everything was okay.

- 1 Q. Let me back up real quick, so I want -- this one  
2 thing here. Not including the seconds on the vertical  
3 gaze nastagmus because that doesn't really count as  
4 clues, that it would take at least, to be able to see all  
5 the clues you said you saw, it would take at least 64  
6 seconds to do this test correctly. Would you agree with  
7 that?
- 8 A. That sounds right.
- 9 Q. At a minimum. And that doesn't include any seconds  
10 for equal passing or anything like that.
- 11 A. That sounds about right, yes, sir.
- 12 Q. And you said equal passing was --
- 13 A. Equal tracking.
- 14 Q. How many seconds on those?
- 15 A. You know, I don't recall whether it actually  
16 specifies, because it isn't part of the standardized  
17 systematic portion of the test.
- 18 Q. Okay. So you choose the line that would be used,  
19 correct, an imaginary or real line?
- 20 A. I chose where to have the test. Is that what you're  
21 asking?
- 22 Q. Yes, sir.
- 23 A. Yes, sir.
- 24 Q. Why an imaginary line versus a parking lot line that  
25 was there?

- 1 A. One's relative to a good view for the camera, and  
2 one would take you out of line of site of the camera, as  
3 well as lighting from headlights and what have you.
- 4 Q. How wide of an imaginary line do you give them?
- 5 A. Well, that's a really good question. I never  
6 specify.
- 7 Q. So you don't know if this line was a foot wide or  
8 two inches wide, do you?
- 9 A. That's correct.
- 10 Q. That would make it a little different for the clue  
11 of stepping off the line, wouldn't it?
- 12 A. It would make a difference I suppose.
- 13 Q. Okay. Now, you gave him some instructions on how to  
14 do the test, correct?
- 15 A. That's correct.
- 16 Q. These are standardized instructions?
- 17 A. Pretty standard, yes, sir.
- 18 Q. And as you're giving the instruction you're supposed  
19 to demonstrate, is that true?
- 20 A. You want to be as clear and precise as you can so  
21 that there is no miscommunication.
- 22 Q. And he's standing in this one position while you're  
23 giving instructions, one foot in front of the other?
- 24 A. That is correct.
- 25 Q. So a length of instructions could matter, couldn't



1 it?

2 A. It could.

3 Q. And so you just testified that -- well, I want to be  
4 clear. So as you're giving instructions, you're supposed  
5 to demonstrate, correct?

6 A. You're supposed to demonstrate as well as give  
7 verbal instructions.

8 Q. At the same time?

9 A. I don't recall if it specifically states at the same  
10 time, but I believe that whenever I described and  
11 demonstrate, it's me just trying to make sure that  
12 whoever I'm dealing with is very clear on what's expected  
13 of them.

14 Q. Did you tell him to maintain the standing position  
15 during your instructions?

16 A. The instructional position, yes, sir.

17 Q. So that will be on the video?

18 A. Yes, sir.

19 Q. And you counted that as clue against him, didn't  
20 you?

21 A. Whenever he didn't maintain it?

22 Q. Yes.

23 A. That's correct.

24 Q. And if it's not on the video, would you agree that  
25 you deviated?

- 1 A. Which part?
- 2 Q. That if it's not on the video that you told him to
- 3 maintain his position during that, as part of your
- 4 instructions, would you agree then that you deviated from
- 5 the standardized procedures, sir?
- 6 A. If I didn't tell him to stand in the instructional
- 7 stance, then I would agree that that's a deviation from
- 8 the way it's supposed to be done.
- 9 Q. Let me rephrase my question, make sure we're clear.
- 10 Not putting him in the standing position?
- 11 A. Informing him to make sure he stays standing in that
- 12 position.
- 13 Q Maintaining that position?
- 14 A. That's correct.
- 15 Q. Okay. You said he stopped several times. How many
- 16 time did he stop during this test?
- 17 A. I don't recall the exact number.
- 18 Q. Did you write it in your report?
- 19 A. I believe I wrote several, instead of specifying an
- 20 exact number, because I couldn't recall.
- 21 Q. You wrote the report immediately after the stop,
- 22 correct?
- 23 A. That's correct. Relative to after the stop.
- 24 Q. And you had the video, you could have went back and
- 25 reviewed?

- 1 A. That's correct.
- 2 Q. Several times would denote more than once?
- 3 A. It would -- it would.
- 4 Q. And you're not able to tell us whether it was going  
5 up or going back?
- 6 A. No, sir.
- 7 Q. The video will speak for itself.
- 8 You said he missed heel-to-toe. How many times did  
9 he miss heel-to-toe?
- 10 A. I would have to double-check my report.
- 11 Q. How far did he miss?
- 12 A. In excess of an inch.
- 13 Q. You're saying each time he was more than an inch  
14 off?
- 15 A. That's correct, any time that I would have noted it.
- 16 Q. You said he steps off line. Which steps did he step  
17 off line?
- 18 A. I don't recall.
- 19 Q. Can you tell us whether it was the front steps or  
20 the back steps?
- 21 A. Well, considering that the back step would have been  
22 the foot that's planted as somebody's stepping forward,  
23 are you asking --
- 24 Q. Let me rephrase my question. Was it the front nine  
25 or the back nine steps coming back?

- 1 A. I don't recall exactly, no, sir.
- 2 Q. How far do they have to step off the line to be  
3 counted as a clue?
- 4 A. Oh goodness, you know, I would honestly have to  
5 refresh on my training as long ago as it's been. I've  
6 been out of law enforcement for more than a year and a  
7 half.
- 8 Q. When would you count it as a clue?
- 9 A. Whenever the manual would have required. If you're  
10 asking me to recall as best I can, I believe it's two  
11 inches, I think.
- 12 Q. So the whole foot has to be off?
- 13 A. That's correct.
- 14 Q. Not just pointed out?
- 15 A. That's correct.
- 16 Q. And you said that he raised his arms for balance.  
17 How many times did he raise his arms?
- 18 A. I don't recall, sir.
- 19 Q. Was it the front nine or the back nine steps?
- 20 A. Again, I don't recall, sir.
- 21 Q. How far does he have to raise his arms before you  
22 count it as a clue?
- 23 A. More than six inches off the body, if memory serves  
24 on my training.
- 25 Q. And you watched the video. Would you agree, it

- 1 appear that he is a stocky guy and his hands are pretty  
2 much six inches out all the time?
- 3 A. I would agree with that, yes, sir.
- 4 Q. So you're saying he raised it an additional six  
5 inches?
- 6 A. You know, if you're asking if the proximity starts  
7 at six inches from a resting position or six inches from  
8 the body?
- 9 Q. Well, what direction did you -- what instruction did  
10 you tell him?
- 11 A. To keep his arms down and relaxed at his side.
- 12 Q. So you didn't tell him on his body?
- 13 A. This is correct.
- 14 Q. And his arm's already out, and so you don't know  
15 whether you count as a clue automatically, or whether he  
16 actually then raised it further?
- 17 A. The limitation I believe is six inches from the  
18 body. I imagine that because I'm -- for the entirety of  
19 my time in law enforcement, I'm never out to get anybody,  
20 so I always allow for -- or try to allow for leniency and  
21 taking things into consideration. That's why I asked  
22 about medical conditions. I take into account somebody's  
23 size, even their age.
- 24 Q. You ask about medical conditions because that's part  
25 of the standardized training, isn't it?

- 1 A. That is.
- 2 Q. Let's talk a little bit about the one-leg stand?
- 3 A Okay, sir.
- 4 Q. You said he was swaying and unbalanced. Was it a
- 5 pronounced sway? At what point do you count it as a
- 6 clue?
- 7 A. Once you start to get outside of about two inches of
- 8 sway, is when I would start noting it.
- 9 Q. So it would be a noticeable sway?
- 10 A. Yes, sir.
- 11 Q. And we'd be able to see that in the video?
- 12 A. You might be able to.
- 13 Q. Once again let's go back to the arms. You say he
- 14 used his arms for balance. Is he allowed six inches on
- 15 this?
- 16 A. I want to say yes, but I can't remember exactly, you
- 17 know, like I said, I have been out of law enforcement for
- 18 a while now.
- 19 Q. Well, if it's a clue, then there's going to be --
- 20 A. A standardized and systematic method, yes, sir.
- 21 Q. And once again his arms still naturally just hanging
- 22 out wide, correct?
- 23 A. When the test was beginning, yes, sir.
- 24 Q. So are you saying on this test he raised his arms
- 25 further out, or that he kept them the same?

1 A. If he was using his arms for balance then it would  
2 have been further out from a resting position.

3 Q. I kind of talk with my hands too, so if someone's  
4 just going like this, could you count that as a clue,  
5 using my hands to talk?

6 A. I would not. Unless, -- I'm trying to give as clear  
7 and concise of an answer as I can based on your  
8 questions. If somebody's already relatively talking with  
9 their hands and then they happen to lose their balance,  
10 and they use the same hand to maintain that balance, then  
11 there's a possibility I can consider that.

12 Now, based on the video, it didn't appear that while  
13 he was talking with his hands he was using it for  
14 balance. If that helps to answer that question.

15 Q. I understand that's your opinion.

16 A. That -- right.

17 Q. Right. Now you said he put his foot down. How many  
18 times?

19 A. I believe it was two.

20 Q. Okay. Was that two separate actions, was it one  
21 action?

22 A. It would have been two separate.

23 Q. And we can see that on the video also?

24 A. I don't know if you can see his feet on the video.  
25 I believe you can on the video see the movement of his

- 1 body that would be lead you to believe that it was an  
2 opportunity where that foot would have gone down.
- 3 Q. Okay.
- 4 A. Again, I'm trying to just answer as best I can.
- 5 Q. So, if he put his foot down, and then put it back  
6 down real quick again, you'd count that as two or one?
- 7 A. If he picked his foot back up and then immediately  
8 put it back down, I would have counted it as a separate.
- 9 Q. So no benefit of the doubt on that one?
- 10 A. No, the count would be the count on that.
- 11 Q. Now, you asked Mr. F.N. to take a breath test?
- 12 A. I did.
- 13 Q. You told him he had a right to refuse that test?
- 14 A. I did.
- 15 Q. And that was after he was arrested?
- 16 A. It was.
- 17 Q. And that point he completely cooperated with you up  
18 to that point until you handcuffed him?
- 19 A. I would say even past that point. He was a very  
20 cooperative individual.
- 21 Q. Okay. And told him he didn't have a right to talk  
22 to a lawyer before making the choice?
- 23 A. That is correct.
- 24 Q. And in fairness to you, you have to read him that?
- 25 A. Implied consent form.



- 1 Q. Right. It's not just you being mean, it's --
- 2 A. That's correct.
- 3 Q. Okay. Let's go back and break these down now.
- 4 (Pause in proceedings.)
- 5 (Video played.).
- 6 Q. Now, we notice you turned off your flashing lights
- 7 during the stop. Why did you turn off your flashing
- 8 lights?
- 9 A. As we were kind of talking about before on things
- 10 that induce nastagmus, flashing lights are one of those
- 11 things.
- 12 Q. Is that called optokinetic nastagmus?
- 13 A. I believe that's the term, yeah.
- 14 Q. And do you know the definition of what optokinetic
- 15 nastagmus is from your training?
- 16 A Oh, goodness, no, it's been too long and I wouldn't
- 17 be able to have that kind of perfect recall.
- 18 MR. HUNSUCKER: May I approach?
- 19 THE COURT: Yes. Would you like to mark that?
- 20 MR. HUNSUCKER: Yeah, I would move to admit the
- 21 manual, which is Exhibit 1 for the defense.
- 22 MS. BRANDON: No objection, Your Honor.
- 23 MR. HUNSUCKER: May I approach?
- 24 THE COURT: Yes.
- 25 Q (BY MR. HUNSUCKER) On the very bottom of the page.

1 THE COURT: What page?

2 MR. HUNSUCKER: 8-3.

3 THE COURT: Thank you.

4 Q. (BY MR. HUNSUCKER) What's the definition of  
5 optokinetic nastagmus you were taught?

6 A. Nastagmus can also result directly from neural  
7 activity. Optokinetic nastagmus occurs when the eye  
8 fixates on an object that suddenly out of sight or when  
9 the eyes watch sharply contrasting moving images.

10 Q. Let's watch this video real quick.

11 (Video playing.)

12 I'm going to ask you questions about what's going on  
13 back here --

14 A. Understood.

15 (Video stopped.)

16 Q. Okay. What was going on back there on the road that  
17 he was facing?

18 A. You'd be referring to vehicles driving by.

19 Q. With headlights on?

20 A. That's correct.

21 Q. Going from side to side both directions?

22 A. That's correct.

23 Q. Taillights going side to side both directions?

24 A. That's correct.

25 Q. And off to the right there's a complete

- 1 intersection, correct?
- 2 A. That's correct.
- 3 Q. And so that test is facing to the right?
- 4 A. That's correct.
- 5 Q. And so you turned off your headlights to avoid
- 6 optokinetic nastagmus, correct?
- 7 A. That is correct.
- 8 Q. Because that could compromise the test, would you
- 9 agree?
- 10 A. I would agree.
- 11 Q. Could that possibly compromise the test also?
- 12 A. There's a possibility, yes, sir.
- 13 Q. If you will keep an eye on that time up there, I'm
- 14 going to ask you what time you started this test, when
- 15 you first started the first pass.
- 16 A. Okay.
- 17 Q. I show it as 1:21:27, would you agree with that?
- 18 A. I would, sir.
- 19 Q. And will you play it through -- will you tell me
- 20 when the test ends, not including the vertical gaze
- 21 nastagmus. So right before you go up?
- 22 A. The clued portion yes, sir.
- 23 Q. Yes. Would you agree 1:22:13?
- 24 A. I would, sir.
- 25 Q. So 21:27 to 22 would be 33 seconds, plus 13 seconds.

- 1 So would you agree that you gave that test in 46 seconds?
- 2 A. I would agree, sir.
- 3 Q. Far below the 64 seconds needed to do that test
- 4 correctly?
- 5 A. That's correct.
- 6 Q. Would you say you've compromised the validity of
- 7 that test?
- 8 A. I would say that based on the standardized and
- 9 systematic the answer is yes.
- 10 Q. We talked about having an imaginary line versus a
- 11 real line. And you stated that you wanted to keep it
- 12 within the video screen. Is there a line there or there
- 13 that could have been used that would have their feet on
- 14 the video?
- 15 A. It could have, yes, sir.
- 16 Q. That would really help us today to be able to tell
- 17 if you did this test correctly, wouldn't it?
- 18 A. Sure.
- 19 Q. And if you had used the yellow line, he would have
- 20 known exactly what the designated line was not to step
- 21 off of?
- 22 A. Those are helpful, yes, sir.
- 23 Q. Earlier we talked about the walk and turn. We kind
- 24 of started briefly talking about instructions and
- 25 demonstrating at the same time?

- 1 A. I recall that.
- 2 Q. And I think my question was, were you supposed to  
3 give the demonstrations as you give the instructions,  
4 correct?
- 5 A. I recall, yes.
- 6 Q. And you don't recall the answer?
- 7 A. (Indicating.)
- 8 Q. As you read through the instructions just briefly,  
9 does it basically tell you to demonstrate kind of as  
10 you're going through?
- 11 A. Give me just a second. I just want to make sure I'm  
12 answering as exact as I can. It states that for  
13 standardization in the performance of this test, have the  
14 subject assume the heel-toe stance by giving the  
15 following verbal instructions, accompanied by  
16 demonstrations.
- 17 Q. And then it actually gives you the instructions to  
18 give, right?
- 19 A. Right. And breaks it down.
- 20 Q. And as it breaks it down in parenthesis next to each  
21 one it will say demonstrate?
- 22 A. Sure.
- 23 Q. So it appears that as you're giving the instructions  
24 you should be demonstrating it at the same time, would  
25 you agree?

1 A. That is kind of one of those back and forth. I see  
2 your point.

3 Q. Well, you would agree that if you give the  
4 instructions, and then you turn around and you give the  
5 instructions again while you're demonstrating, you have  
6 now made the instructional phase a longer period of time,  
7 would you agree with that?

8 A. I would agree with that.

9 Q. And during this timeframe he is being judged by  
10 staying in the starting position?

11 A. That is true.

12 Q. And so if you take a longer time than you're  
13 supposed to, there's a greater chance that he will break  
14 that position and be counted against him?

15 A. That is true.

16 Q. On the video you were saying "off" when he was doing  
17 the test. Does that mean he was standing off the line?

18 A. That's my personal notes of, yes, sir, stepping off  
19 line.

20 Q. When you say "off" that would correlate to the time  
21 he stepped off the line?

22 A. That's correct.

23 Q. And you would agree if I stepped off the line  
24 completely, then my leg would not be in front of the  
25 other leg?

- 1 A. That's correct.
- 2 Q. So we -- and we can't see his feet in this test?
- 3 A. Unfortunately, no.
- 4 Q. But we can see his legs?
- 5 A. Yes.
- 6 (Playing video.)
- 7 Q. Real quick, his hand position, that appears to be
- 8 his natural hand position?
- 9 A. It appeared to be a little bit outside of what would
- 10 be natural, but yes.
- 11 Q. At this point you haven't told him to keep his hands
- 12 by his side?
- 13 A. At that point I believe I had already put him in the
- 14 instructional stance and told him to put his hands down
- 15 and relaxed as his sides.
- 16 (Playing video.)
- 17 Q. Okay. Where he's standing there does it appear that
- 18 his arms are resting out from his body?
- 19 A. That does appear to be his natural position, yes,
- 20 sir.
- 21 (Playing video.)
- 22 Q. It appears this last one you said he's off, I just
- 23 want to clarify that's true?
- 24 A. I don't know if it was the last one. Even if I was
- 25 reviewing the video earlier today, unfortunately seems to

1     -- I don't know if it's been fixed in the last year and a  
2     half since I've been out, but a recurring thing that I've  
3     noticed there are times when the audio and video don't  
4     necessarily sync up perfectly, so I can't be sure.

5             (Video played.)

6     Q.    Okay. Did you count how many times he stopped?

7     A.    I did not.

8     Q.    Okay.

9     A.    You're asking me if I counted out loud into my mic?

10    Q.    No, I was asking just then when you watched the  
11    video, it appeared that he stopped at the very end one  
12    time. I just wanted to ask you, are you saying that you  
13    saw him stop more than that?

14    A.    Yes.

15    Q.    Play it again. We'll see it again.

16             (Playing video.)

17    Q.    How many times did you see him stop?

18    A.    Based on watching the video, it only looked like  
19    there was maybe one on the way down, and then one or two  
20    on the way back.

21    Q.    One or two on the way back.

22             Let's talk about stops now. Number C, which clue is  
23    that?

24    A.    That would be stops while walking.

25    Q.    And what does it say?



1 A. "A suspect pauses for several seconds. Do not  
2 record this clue if the suspect is merely walking  
3 slowly."

4 Q. Thank you. So you're -- with that in mind, under  
5 this definition in your manual, how many times did he  
6 stop?

7 A. Zero.

8 THE COURT: Mr. Hunsucker, I think we're losing  
9 the audience, why doesn't everybody stand up and stretch  
10 or something because we're on the home stretch but we're  
11 kind of dosing off. It's kind of toasty in here. I know  
12 you're working hard, and I want to make sure your  
13 audience is aware, so just stretch, get some blood  
14 flowing. And we're -- one way or the other we'll be out  
15 of here by 5, so.

16 MR. HUNSUCKER: I'm trying.

17 THE COURT: All right.

18 Q. (BY MR. HUNSUCKER) Let's finish up with the  
19 one-legged stand real quick. One of the clues you marked  
20 him on was raising his hands six inches or more away from  
21 his body, is that correct?

22 A. That's correct.

23 (Playing video.)

24 Q. We'll try to kill two birds with one stone. You  
25 said that he was swaying in the video also?

- 1 A. Yes.
- 2 Q. That would be two inches or more for you to count  
3 it?
- 4 A. That is correct.
- 5 (Playing video.)
- 6 Q. Okay. Are you saying that based on there that at  
7 some point he raised his arm more than six inches?
- 8 A. Yes, sir.
- 9 Q. And that he did it in that video?
- 10 A. I don't know if it can be seen in that video, but if  
11 I noted it, then that's what he did. By description,  
12 what I'm saying is, unfortunately based on the angle, you  
13 can only see one of two arms.
- 14 Q. And you testified earlier that you place them in  
15 certain positions based upon being able to capture it on  
16 the camera, correct?
- 17 A. I definitely try to, yes, sir.
- 18 Q. And you could have easily turned him where he was  
19 facing the camera, couldn't you?
- 20 A. I definitely could have.
- 21 Q. And there's another clue of hopping, and he didn't  
22 have hopping at all, did he?
- 23 A. No, sir.
- 24 Q. And this is the least reliable of the three, isn't  
25 it?

1 A. Based on the three different tests, we're talking  
2 about the mid 90s --

3 Q. I'm not getting into actual percentages.

4 A. I'm just saying that I don't recall which one had  
5 the highest percentage solo test of those three tests.  
6 If that's what you're asking.

7 Q. Now, you asked on the video whether or not he had  
8 spilled anything upon himself as far as alcoholic  
9 beverages, correct?

10 A. That's correct.

11 Q. Were you not sure where the alcoholic beverage was  
12 coming from at that point?

13 A. I wouldn't say that. I was more along the lines of  
14 an off-the-cuff question just to see what the answer was.  
15 I don't always ask that, so.

16 Q. The little handheld device you got. That was in  
17 your trunk, wasn't it?

18 A. Yes.

19 Q. In the heat?

20 A. I don't know about heat, but.

21 Q. July 30th, though?

22 A. Possible it's warm in there, yeah.

23 Q. And you don't have any type of specialized training  
24 as far as knowing how those machines actually work  
25 inside?

- 1 A. The mechanics of it, no.
- 2 Q. So you would have no way of knowing whether heat  
3 could affect that test, how that little machine acts or  
4 not?
- 5 A. No way of knowing, sir.
- 6 Q. Okay. And it really has no relevance because it's  
7 not an accepted device, wouldn't you agree?
- 8 A. It's not admissible in court, so yes, I would agree.
- 9 Q. Well, you don't even write it in your report?
- 10 A. Not generally, no.
- 11 Q. But what do you say, you say, well, that confirms  
12 the odor of alcohol. Once again, were you not sure about  
13 the odor of alcoholic beverage?
- 14 A. I'm a big fan of redundancy, as much that I can be.
- 15 Q. Now, he told you he was safe to drive, didn't he?
- 16 A. Yes.
- 17 Q. And then you kind goaded him a little bit and asked  
18 a couple more questions, and he said not by -- well,  
19 maybe not by standard?
- 20 A. I think you kind of rolled a lot into that one  
21 question.
- 22 Q. Well, --
- 23 A. Because to answer yes to that would also imply that  
24 I agree with the idea of goading him.
- 25 Q. I'll rephrase the question.

1           After he told you he was safe to drive, did you ask  
2   him anything else?

3   A.   I asked him.

4   Q.   So you're still trying to get another answer out of  
5   him besides yes?

6   A.   That is correct.

7   Q.   And he said maybe not by standard?

8   A.   I can't remember if he said standard, or by my  
9   standard, but yes, he did say that.

10   Q.   And at that point you're still trying to get more  
11   information, so you asked him, a legal standard? And he  
12   says no. Okay.

13           So even when you asked him repeated times -- and  
14   then he told you just by your standard?

15   A.   He did say that.

16   Q.   Okay. So even though you asked several times, he  
17   pretty much stuck by the gun and said he was safe to  
18   drive and not -- and legal still?

19   A.   You know, I think that's not a fair statement, only  
20   because whenever I initially asked him the question the  
21   first time, a lot of people, did you run your head into  
22   that wall, the answer's going to be an immediate yes or  
23   no. Well, he didn't immediately answer even the first  
24   time I asked him, he hee-hawed around it before finally  
25   committing.

- 1 Q. Did he hee-haw -- well, you're speculating he  
2 hee-hawed?
- 3 A. That's correct. That's my perception.
- 4 Q. He could have just been trying to think of the  
5 answer, actually deducing it in his head?
- 6 A. That's also a possibility, yes, sir, I apologize.
- 7 Q. One other thing. When you cuffed him, and I don't  
8 think you did that intentionally, but the cuffs for his  
9 body were just too tight?
- 10 A. No.
- 11 Q. Was he complaining that the cuffs were too tight?
- 12 A. He did.
- 13 Q. And complaining they were hurting him?
- 14 A. He did.
- 15 Q. And at the point you asked him to take the breath  
16 test, he was handcuffed, wasn't he?
- 17 A. For the state's breath test, yes, sir.
- 18 Q. And that was the same breath test that you told him  
19 he had a right to refuse?
- 20 A. That's correct.
- 21 Q. And the same breath test you told him he didn't have  
22 a right to a lawyer?
- 23 A. That's correct.
- 24 Q. And he's at this point complaining about his  
25 handcuffs being too tight?

1 A. That's correct.

2 Q I want to be clear.

3 (Playing video.)

4 Q. You place him under arrest. You failed my field  
5 sobriety test. You relied upon field sobriety tests to  
6 make your decision to arrest, isn't that true?

7 A. That is true.

8 Q And even after you arrested him and told him he was  
9 going to jail, he was asking you why, wasn't he?

10 A. He did ask that.

11 Q 819. If you could just read the bold part please?

12 A "It is necessary to emphasize this validation  
13 applies only when the tests are administered in the  
14 prescribed standardize manner. The standardized clues  
15 are used to assess the suspect's performance. The  
16 standardized criteria are employed to interpret that  
17 performance. If any one of these standardized field  
18 sobriety test elements is changed, the validity is  
19 compromised."

20 MR. HUNSUCKER: Pass the witness, Judge.

21 END OF CROSS EXAMINATION

22

23 JUNE 5, 2018:

24 RECROSS-EXAMINATION

25 BY MR. HUNSUCKER:

- 1 Q. Let's just start with the blood test questions  
2 first. Good morning, by the way.
- 3 A. Good morning, sir.
- 4 Q. So you didn't ask for blood tests in this case, did  
5 you?
- 6 A. I did not. I asked a breath test.
- 7 Q And it's your choice, isn't it?
- 8 A. It is.
- 9 Q. You get to choose what test you offer him?
- 10 A. I do.
- 11 Q. And so all these questions about whether a blood  
12 test could be offered in an accident; mandatory, not  
13 mandatory; it didn't doesn't really apply here because it  
14 was a breath test, correct?
- 15 A. I don't know about not being able to apply. I tend  
16 to default to a breath test because it's less invasive.
- 17 Q. And it's easier for you, isn't it?
- 18 A. It depends on how backed up it is down at the jail,  
19 but it tends to go a little bit faster, yes, sir.
- 20 Q. And would you agree that a blood test is more  
21 accurate than a breath test?
- 22 A. I don't know that I'd agree or disagree. Both are  
23 listed as possible options for testing, so I imagine both  
24 are very accurate whenever it comes to alcohol.
- 25 Q But you don't know, is what you're saying?



- 1 A. Well, I know that I can't test for drugs on a breath  
2 test, so by default a blood test would be more accurate  
3 in the availability of things it can test for.
- 4 Q. If it's a fatality accident, regardless of whether  
5 the suspected DUI driver is injured or not, the State  
6 mandates a blood test, correct?
- 7 A. That is correct.
- 8 Q. They don't mandate a breath test or give you a  
9 choice, do they?
- 10 A. That is correct.
- 11 Q. But in this case you get to make the choice whether  
12 it's breath or blood?
- 13 A. That's correct.
- 14 Q. And let's be clear. We don't have any type of  
15 approved breath score in this case?
- 16 A. I --
- 17 Q. You didn't give any type of intoxilyzer test that is  
18 admissible in court?
- 19 A. That's correct.
- 20 Q. And so you don't have a test score from an  
21 intoxilyzer, an approved device that's a .05, .06, .07?
- 22 A. That's correct.
- 23 Q. Now, let's go back to the very beginning. They were  
24 asking you about traffic violations and you said that the  
25 wide turn was a possible indication of intoxication,

1 correct?

2 A That's correct.

3 Q And the very next sentence though you said that  
4 you've arrested -- you've stopped people for a wide turn  
5 that were not intoxicated.

6 A. That is correct.

7 Q. Just the fact that he made a wide turn on a road  
8 that had two lanes, isn't necessarily an indication he's  
9 under the influence of alcohol?

10 A. It's no indication that it's a guarantee that that  
11 person is under the influence, that's correct.

12 Q. Now, the State asked that you don't like doing more  
13 paperwork. You do recall that?

14 A. Yes, sir.

15 Q. Let's talk about your paperwork for a moment. You  
16 actually cut and paste your reports over from one arrest  
17 to the other, don't you?

18 A. There are parts of it that I can cut and paste, yes,  
19 sir.

20 Q. And on top of that, you use a form to begin with,  
21 don't you, a county form?

22 A. Are you talking about the blue sheet, things like  
23 that?

24 Q. No. Does the county prescribe the way you should  
25 write your report?

- 1 A. Not for my report.
- 2 Q. That's fine.
- 3 A. But whenever it comes to cutting and pasting, you
- 4 know, things like probable cause affidavit, there's
- 5 common language that stays common on every single PC
- 6 affidavit. There's no sense in retyping up every last
- 7 bit of it if the, "I am deputy," "certified on this date,
- 8 this date, this date," is going to be the same language
- 9 on every single form I ever fill out.
- 10 Q. You don't write your reports from scratch every
- 11 time? That is a yes or no question.
- 12 A. That would be no.
- 13 Q. Now, they asked you about the PBT and whether you
- 14 considered the results of that little handheld device.
- 15 Now, isn't it true that yesterday you admitted that
- 16 device was in the trunk of your car?
- 17 A. Yes, sir.
- 18 Q. And that this arrest was July 30th, correct?
- 19 A. I'd have to double-check my report, but that is the
- 20 date, yes.
- 21 Q. And you admitted yesterday you don't really know if
- 22 heat could affect that device or not?
- 23 A. I do not.
- 24 Q. And it's not an approve device?
- 25 A. It's not admissible in court.

- 1 Q. Isn't not admissible in court because it's not an  
2 approved device?
- 3 A. I don't know how to answer appropriate language of  
4 an approved device. I know that there's scientifically  
5 accurate, the State's breath test, and PBT is considered  
6 to be less accurate. That's why it's not admissible in  
7 court.
- 8 Q. You are CLEET certified?
- 9 A. I am -- well, I was.
- 10 Q. You were. And you at some point were in intoxilyzer  
11 training?
- 12 A. Yes.
- 13 Q. By the Oklahoma Board of Tests?
- 14 A. Yes.
- 15 Q. And they go through a list of approved devices by the  
16 Oklahoma Department Board of Tests that you can use?
- 17 A. Thank you for clarification. The answer is no, it's  
18 not an approved device.
- 19 Q. Thank you. You testified you tried not to rely on  
20 the field sobriety test results, but in this case you  
21 did, didn't you?
- 22 A. I don't say that I don't try to rely on it, there's  
23 multiple sources of information we try to gather.
- 24 Q. And in this case you relied upon the results of the  
25 field sobriety tests?

- 1 A. Yes, sir.
- 2 Q. And in fact, when you arrested Mr. F.N., you said
- 3 you failed the field sobriety tests?
- 4 A. That's correct.
- 5 Q. And at that point you didn't say, you failed the
- 6 field sobriety tests, and you had an odor, and you had
- 7 bad driving, or other clues, did you?
- 8 A. No. There's no legal reason for me to have to
- 9 explain the cause of my arrest to somebody streetside.
- 10 Q. But you did take the time to say that I'm arresting
- 11 you because you failed my field sobriety test?
- 12 A. Of course, he's courteous, I'm trying do the same.
- 13 Q. Now, let's go back to the drinking, because you
- 14 testified that he told you he had four or five beers.
- 15 And the State asked you that he didn't clarify if it's
- 16 3.2 or 6 percent. Isn't the burden on you to come in
- 17 here and explain to this jury what you investigated that
- 18 night?
- 19 A. Yes, sir.
- 20 Q. The burden's not on him to show anything to you, is
- 21 it?
- 22 A. This is true.
- 23 Q. Okay. And so isn't it -- if it's relevant
- 24 information, isn't it your job to ask those questions?
- 25 A. I think I clarified yesterday for me personally --

1 Q. Sir, let me cut you off. That was a yes or no  
2 question.

3 A. I can't answer yes or no form, if it's --

4 Q. Let me rephrase my question. You keep running off  
5 on me and these are pretty short answers.

6 Isn't it your job to ask questions about relevant  
7 information?

8 A. Yes, sir.

9 Q. Now, you just testified a second ago that you said  
10 the number of drinks really doesn't matter, is that  
11 correct?

12 A. That's correct.

13 Q. But yet you asked how many drinks he had?

14 A. That's correct.

15 Q. Okay. If it doesn't matter why would you ask the  
16 question?

17 A. Again, I think we went over it a little bit  
18 yesterday. But it's a matter of trying to gather as much  
19 information as you can, and it's just another indicator.

20 Q. Gather as much as information as you can?

21 A. That's correct.

22 Q Wouldn't you want to gather the size of the drink?

23 A. It's definitely a question I could have asked, yes.

24 Q. And wouldn't you want to gather the alcohol content  
25 of that drink?

- 1 A. Want to or need to is irrelevant. You try to gather  
2 as much as you can.
- 3 Q. But -- and you could have asked that question?
- 4 A. I could have.
- 5 Q. And he was cooperating in answering your questions?
- 6 A. Yes.
- 7 Q. And you chose not to ask that question?
- 8 A. The question didn't occur to me at the time.
- 9 Q. You've done 200 DUI arrests, correct?
- 10 A. Yes, sir.
- 11 Q. You know that you're going to have to come to court  
12 to testify about something?
- 13 A. Yes, sir.
- 14 Q. Now, went into a lot of stuff about unsafe to do  
15 tests and so forth. Mr. F.N. was capable of doing  
16 these tests, correct?
- 17 A. That is correct.
- 18 Q. And you talked about that only a couple refused in  
19 its entirety. But you didn't give Mr. F.N. a choice,  
20 did you, to take the test?
- 21 A. Didn't offer one, no.
- 22 Q. Well, you told him he was going to take the test,  
23 correct?
- 24 A. That is correct.
- 25 Q. And it is a choice, isn't it?

1 A. Anybody can refuse anything, yes.

2 Q. And you didn't tell him he could refuse it?

3 A. No.

4 MR. HUNSUCKER: Just a moment, Judge.

5 Q. (BY MR. HUNSUCKER) You testified today that you  
6 relied upon field sobriety tests in making this arrest,  
7 correct?

8 A. That's correct, sir.

9 Q. And you would agree that you deviated from the  
10 standardized method of doing those tests?

11 A. I would agree.

12 Q. And you would agree that that compromises the  
13 validity of those tests, according to your training?

14 A. Based on the scientific and standardize method, I  
15 would agree.

16 Q. Yes or no question. You would agree that based on  
17 your training that that compromises the validity of the  
18 test?

19 A. I just agreed, yes.

20 MR. HUNSUCKER: Nothing further, thank you,  
21 Judge.

22 END OF REQUESTED TESTIMONY

23

24

25



COUNTY OF OKLAHOMA )

I, Kim Lewin, Certified Shorthand Reporter, within and for the State of Oklahoma, duly appointed and qualified reporter in the District Court of Oklahoma County, State of Oklahoma, do hereby certify that I took down by machine shorthand the proceedings as described on Page 1 herein, and the foregoing is a true, complete and accurate transcript of my shorthand notes so taken of said proceedings.

IN WITNESS WHEREOF, I hereunto set my hand and  
official seal this 10th day of August, 2018.

Kim Lewin, CSR